David H. Bodiker Lecture Series on Criminal Justice*

What Are We Doing to the Children?: An Essay on Juvenile (In)justice

Michael E. Tigar**

You honor me by inviting me. David Bodiker's life teaches us all. A common theme in remembering someone who has passed on is that he, or she, "was taken from us too soon." That should be everyone's goal: others will say you were taken from us too soon. David Bodiker had not accomplished his life's goals when he passed. If you find you have accomplished all your goals, and are still alive, your life plan is not ambitious enough.

Today I am going to talk about some things that David Bodiker knew and confronted in his daily life. David Foster Wallace gave a commencement talk at Kenyon College in 2005 and began:

> There are these two young fish swimming along and they happen to meet an older fish swimming the other way, who nods at them and says, "Morning, boys. How's the water?" And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, "What the hell is water?"

Yes, as law students, law teachers and lawyers, we swim around in the law unaware of what it is actually doing to real people, and perhaps uncaring about what we must do about that. Jerome Frank reminded us that: "A legal system is not what it says, but what it does. Our 'criminal law,' then, cannot be described

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* The late David H. Bodiker, a 1963 alumnus of The Ohio State University's College of Law, was an attorney in the private practice of law for many years in Columbus. He was a fierce advocate for the poor in Ohio's criminal justice system and was singular in his tenacious and relentless advocacy for the rights of Death Row inmates. This lecture series was established to honor the memory, spirit, dedication, and passion of David H. Bodiker, who served as the Ohio Public Defender from 1994 until his retirement in 2007.

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accurately in terms merely of substantive prohibitions; the description must also include the methods by which those prohibitions operate in practice . . . ."

So today I will talk about what the law does to children. I begin with some numbers and anecdotes. I will then set out some principles that I believe must govern the use of penal sanctions against children and those who were children when they committed wrongful acts. I summon you to work towards recognition that children in the criminal law system require special treatment. I commend these ideas to you, for if you find them useful, you will have the choice of taking up the challenge that David Bodiker's life poses for all of us: are you willing to make a difference?

As I set out some facts about punishment, with special focus on juveniles, I am trying to evoke the sort of thoughts that I have when I look at the Vietnam War Memorial in Washington, D.C. There are now 58,261 names on the Memorial wall. That does not count the Vietnamese, Cambodian, and Lao men, women, and children who died during the decades of war in Indochina, nor the French soldiers who were also killed. And you look at the names, and think of the numbers, and I hope you say, "What was that about?" "Wasn't there a better way?" Sometimes "naming," reciting painful facts, alerts us that something needs to be done, without elaborate argument.

The United States of America uses the penal sanction more than any other country in the world. Looking first at adults, the United States incarcerates about 750 people per 100,000 population. Russia is second with just over 600, followed by Rwanda with 600, and Israel with just over 300. In France the rate is less than 100 per 100,000 population, and Canada is about the same. For Japan, the number is just over fifty. We have five percent of the world's population and twenty-five percent of the world's prisoners. We shuffle people into jail in assembly-line fashion. More than ninety percent of criminal cases end with a guilty plea. In a recent year in New York, two-thirds of misdemeanor defendants pleaded guilty at their first appearance in court. In Brunswick County, North Carolina, where I have some experience, if you are arrested on a narcotics charge, you can make a deal and get some jail time at your first court appearance. If you insist on having the seized material analyzed, or assert other procedural rights, the deal goes away or the jail time demanded increases. Your appointed counsel is on a short budgetary leash, and has a powerful incentive to get you to plead.

We spend about 60 billion dollars a year for this system of prisons, jails, and boot camps. The dramatic increase in prison population continues despite the fact that since 1975, the crime rate has declined by more than forty percent. African-American and Hispanic people now make up more than half the prison population, and that percentage has increased steadily since 1926, the earliest year for which figures are available. If you were born in 1991, and are an African-American male, your chances of going to prison are 32.2 percent. If you are white, they are 5.9 percent, if Hispanic they are 17.2 percent. African-American females have a nearly six-fold chance of going to prison, compared to white females.

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In prisons, the instances of ill-treatment and outright brutality are pandemic. Twenty percent of prisoners report sexual abuse by guards or fellow inmates.

Under budgetary pressure, and with some political leadership from Senator James Webb and others, there is pressure to cut back on incarceration rates and to provide meaningful re-entry programs for prisoners. Anyone who has worked on parole issues, as I have, will tell you that this is a difficult undertaking. The lobbies for more prisons are powerful, and they join happily in the ever-rising toll of spending for what is called "public safety." As a percentage of civilian government spending, public safety expenditures have climbed from 7.5 per cent to 15 percent from 1959 to 2005. All of this imprisonment apparatus costs upwards of sixty billion dollars per year.

"Ah, yes, 'you may say,' but what about the children? You are talking about adults." Not really, or not entirely. From 1992 to 1997, forty-four states and the District of Columbia passed laws making it easier to try children as adults. An Amnesty report in 1998 noted that 200,000 children were being prosecuted in adult courts every year, and that over 11,000 children were in adult prisons. In 2007, the *Los Angeles Times* reported that 2,327 young people were serving life without parole sentences for crimes committed while they were less than eighteen years of age. California had 227 such prisoners, and Pennsylvania had 433. These inmates will die in prison decades hence. This 2,327 figure is the highest in the world. Israel comes in second, and they have seven.

The rate of juvenile incarceration has increased by forty-three percent in the last twenty-five years. The use of "regular" criminal law punitive sanctions against juveniles has been a driving force for this dramatic increase. In each year from 1985 through 2004, about 8,500 children under eighteen were referred into the adult criminal law system, for a total of 174,332. More than 1,600 children so referred were thirteen years of age or under, 4,740 were fourteen, and 17,204 were fifteen. Fifty-four percent of these children were African-American.

This sort of treatment for young children was forbidden even by classical Roman law, and researchers at the LBJ School in Austin were unable to find any instance anywhere in the modern world where a child as young as twelve or thirteen received a multi-decade sentence in adult prison. Yet, in South Carolina, a twelve-year old boy named Chris Pittman who killed his grandparents, received a sentence of thirty years without parole, even though the evidence showed not only that he was youthful, but that he was probably acting under the influence of a powerful prescription drug, with known side-effects, that had been prescribed for him.

In 1997, William Ayers published *A Kind and Just Parent: The Children of Juvenile Court.* His book consisted largely of case studies that illustrated dramatically why the system that calls itself juvenile justice is failing. Ayers takes his title from the first annual report on the Cook County, Illinois, juvenile court, in 1900:

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> The law, this Court, this idea of a separate court to administer justice . . . like a kind and just parent ought to treat his children . . . has gone beyond the experimental stage and attracted the attention of the entire world. This is a pioneer movement, Illinois being the first state to provide a court for children.

More than six decades after this statement of hope had been disappointed by experience, the Supreme Court decided *In re Gault*. Young Mr. Gault had allegedly made an obscene phone call. He was certainly present when such a call was made, and there was doubt whether he spoke the lewd words or his friend did so. At a hearing without a lawyer, a transcript, a complainant, or notice of charges, he was found delinquent. This fifteen-year-old boy was then sentenced to the state industrial school, there to remain until he was twenty-one. The underlying offense on which this adjudication of delinquency was based would have allowed an adult defendant to be sentenced to at most two months in a common jail. The sentencing judge did recall that he also thought young Gault was habitually immoral, but had no clear memory of why he thought so. There was certainly no prior official record of any such thing.

The United States Supreme Court held that Arizona's juvenile system, which adjudicated Gault's case, violated due process in a number of ways, and that rights to notice, hearing, confrontation, and counsel should be provided. Justice Stewart, uncharacteristically, dissented with a statement that showed that the 1900 Illinois dream was still alive, even if the real world had long since passed it by. He noted that the dream of juvenile and family courts had taken hold in all fifty states, and that while these courts often fell short of their stated goals, constitutionalizing their procedures was not the answer.

Do you now have a shred of doubt that the work of David Bodiker and others like him is important? Can you think of ways that you might be called to seek justice?

And now some anecdotes, a kind of roll call of the states. In Pennsylvania, juvenile court hearings are often closed, to the public and to attorneys and child advocates. On February 13, 2009, the *New York Times* reported that two Pennsylvania judges pleaded guilty to wire fraud and income tax fraud in connection with their scheme. Judge Michael Conahan worked with private juvenile prisons to get them contracts with the state. Judge Mark Ciavarella would then send juveniles who appeared in his court to these prisons, even though the law and the evidence did not warrant incarceration. Both judges got payoffs for these activities, and they did not report the money on their tax returns. The private prisons and their managers were not prosecuted. Civil litigation to undo the results of this criminality is still going on.

In Texas, a young man named Joseph Galloway was put into a juvenile detention facility at a young age. He was held years beyond his original sentence, and finally released at age nineteen. But that is not the story. Mr. Galloway was sexually abused by guards at age fifteen, but he kept quiet for fear of retaliation.

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Only when this sort of abuse, and much else, began to be revealed in legislative hearings and in the press, did he feel free to speak out. That public attention had been sought, and was finally obtained, by his mother Ginger Galloway. Ms. Galloway became lead plaintiff in a lawsuit filed by the Texas Civil Rights Project (TCRP) in 2007. The defendants were the Texas Youth Commission (TYC) and several of its leaders and employees. The plaintiffs included Ms. Galloway and other parents of children in custody. Their children had been victims of sexual abuse, inmate abuse, summary punishment, and unwholesome living conditions. They had no access to counsel when they were subject to punishment. They were not being given proper medical treatment, educational services, psychiatric help, counseling on what to do when they were released, or other services that might serve a rehabilitative function.

Under Youth Commission policies, children who had served their sentences and were entitled to be released could be kept in custody based on the decision of the facility superintendent, a decision made without due process or any process at all. Young Joseph Galloway's sentence was extended for years beyond his original sentence. So were hundreds of other children.

The Texas Civil Rights Project is one of this country's most effective and efficient pro bono legal offices. In April 2008, the case was settled. The named plaintiffs received a total of about $500,000 in damages. More significantly, the TYC agreed to institute broad-gauge, judicially-enforced reforms to address all the problems TCRP had identified. The consent decree in that lawsuit awards the Galloways and other plaintiffs substantial damages. The decree also provides for procedures designed to stop abuse, and for educational, psychiatric, custodial, and other reforms. More than 500 children were released from unlawful custody.

The Galloway case was filed in federal district court. Therefore the consent decree recited that the affirmative relief granted was no more than the limited, minimally intrusive remedy permitted by the Prison Litigation Reform Act (PLRA). This latter 1997 statute put severe limits on prisoners' rights to litigate their conditions of confinement, provided for termination of existing remedial decrees, and restricted federal judges' power to provide future remedies.

Yes, the PLRA applies fully to juvenile detention facilities. The Congress classified them as "prisons" and those in them as "prisoners." What this means is that children in custody face even greater hurdles to asserting their rights than do adults. Under the laws of most states, children lack capacity to sue in their own name. This is because Federal Rule of Civil Procedure 17 makes the question of capacity one of state law. A child cannot get into federal court unless an adult is willing to be a guardian ad litem. Children have less life experience and less ability to reach out to someone who might help. Most of us get letters from adult prisoners all the time. If your name is in the paper or on a web site, people write to you. Many, if not most, adult prisoners have some access to the courts, if only to file their handwritten pleadings. There are special rules of procedure designed to recognize the difficulties that *pro se* prisoners may have in making timely filings. I have never received a letter from a child in custody.

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Most lawyers know something about *pro se* prisoner litigation, if only dimly to recall that the great case of *Gideon v. Wainwright* was heard by the United States Supreme Court on a handwritten petition for certiorari.

This is not to say that all is well in Texas. Two years ago, based on the TCRP investigation, two guards were indicted for sexually abusing children in custody. The El Paso district attorney had still not brought the cases to trial two years after the indictments.

Here is the opening paragraph from an order issued October 27, 2008, by Judge Jon S. Tigar of the Superior Court in Alameda County, California, in a lawsuit against the head of the Division of Juvenile Justice of the California Department of Corrections and Rehabilitation:

> In November 2004 this Court issued a Consent Decree that required Defendant to develop and implement remedial plans in six areas: education, medical care, mental health care, safety and welfare, sex behavior treatment, and wards with disabilities. Those remedial plans were developed, but Defendant has not complied with any of them.

Judge Tigar, who inherited the case from another judge who had it on his docket since before the 2004 decree, issued this order after first directing the parties to meet and confer and set a course of action for compliance with the earlier order. The meet-and-confer sessions were unsuccessful. The parties filed briefs. Finally, the judge held many days of hearings at which expert and fact witnesses testified. The state presented "almost no evidence concerning the conditions at its juvenile facilities." The state claimed that the conditions and timetable to which it had agreed—and which were mandated by the earlier decree—were "overly ambitious" and that its recent reforms laid the basis for progress.

The court rejected these contentions and ordered specific steps designed to bring the state into compliance. How these orders will fare in California's current budget crisis cannot now be known. It is one bright spot that the California case is in state court, where the Prison Litigation Reform Act does not apply, and expansive state standing rules help to ensure access to courts.

The California and Texas stories are replicated in state after state. Again, the California case highlights the work of dedicated pro bono lawyers, in this case the Prison Law Office in Berkeley.

In the California case, the 2004 decree had required that the parties develop remedial plans in consultation with recognized experts in the field of juvenile corrections. At the 2008 hearings, five of these experts testified, and they all agreed that nothing significant had been accomplished towards the goals they had helped to set. Consider the lawyers' task in finding experts in the first place, informing them about the underlying facts, and then presenting their testimony persuasively and concisely.

In the opening stages of the lawsuit, the pro bono lawyers cannot know whether they will be successful and receive legal fees. They cannot even know if

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they will be reimbursed for the cost of retaining and presenting experts. At the later stages, when court-ordered fees and expenses are more clearly available, these lawyers will spend long hours of work at rates of pay well below their peers in private practice.

But many, if not most, young people in detention do not have the educational background to use the *pro se* litigation system in this way, and almost all of them lack full legal capacity to sue on their own behalf. The result is that children in custody have even fewer avenues to redress than adults.

Professor Tamar Birckhead of the University of North Carolina has published a brilliant article on that state's juvenile criminal law. She notes:

> North Carolina is the only state in the United States that treats all sixteen- and seventeen-year-olds as adults when they are charged with criminal offenses and then denies them the ability to appeal for return to the juvenile system. Thirty-seven states cap juvenile court jurisdiction at age eighteen, while ten do so at seventeen. In addition, as reflected by international treaties and instruments, many nations of the world consider eighteen to be the most appropriate age for delineating between juvenile and adult court jurisdiction.

Professor Birckhead describes the human cost and consequences of prosecuting some 26,000 sixteen- and seventeen-year-olds in North Carolina's adult courts every year.

However, one of her most telling insights is that such procedures run contrary to a deep international consensus about how children should be treated in the system that calls itself justice. She ably discusses this body of transnational law, reminding us that in *Roper v. Simmons* the Supreme Court relied on this sort of authority in holding that executing children violates the Eighth amendment.

Professor Bernardine Dohrn of Northwestern has written two significant articles on the transnational principles that ought to govern our discussion of children in the criminal law system. Her perspective is informed by her founding role and leadership of Northwestern's children and family law clinic and by her work on transnational law issues in the Netherlands and elsewhere. I have been greatly helped by Professor Dohrn's insistence on the need for a new paradigm for children's rights issues, although I am taking a slightly different path in my remarks today.

Professor Lois Weithorn has chronicled some of the mental health issues confronting troubled children and their families. She reports: "During the six-month period from January 1 to June 30, 2003 'nearly 15,000 incarcerated youth waited for community mental health services' in juvenile detention facilities because of the unavailability or unaffordability of appropriate community-based mental health services."

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This information should be seen together with the California litigation. It seems beyond debate that children in custody should have mental health, physical health, and educational services. Because some of these children are regarded—rightly or wrongly—as dangerous or otherwise "unfit" to rejoin the world outside the walls, they are simply warehoused.

We should not forget the child detainees at Guantanamo, Bagram and—as the saying goes—other undisclosed locations. In late 2002, Mohammed Jawad, who was twelve years old, allegedly tossed a grenade at a passing American convoy in Afghanistan, wounding two United States soldiers and their interpreter. He was taken into custody and kept at Bagram prison, then to Guantanamo in early 2003. A military tribunal officer held that much of the evidence against him had been obtained by torture. United States District Judge Ellen Huvelle also found that he had been tortured. It is worth noting that his alleged crime is probably not an offense in light of the Geneva Conventions, and that classifying him as an enemy combatant is also not in accord with those treaties. The government claims that he was not twelve, but rather sixteen, when he was captured.

When Judge Huvelle ordered him released, an Obama administration lawyer said that the Justice Department is still considering whether to bring a criminal charge against him for trial in a civilian court, now seven years after the alleged event. Jawad is not the only juvenile held and tortured in these prisons.

These anecdotes describe a system of juvenile punishment that reflects the distorted values of a criminal law system designed for adults. They also tell us of horrors within the systems designed for children. A young person caught in the juvenile system finds that the non-incarceration resources are more and more slender. When he or she is incarcerated, life is little different from that in an ordinary jail, unless except that young inmates are easier targets for intimidation and mental or physical assault. A child who is brought into the juvenile correction system is unlikely to have counsel who is better prepared or takes more time with the case than counsel in an adult court.

Let us think of this system and its injustices as having two sides. On the juvenile court side are the horrors of which Pennsylvania, California, and Texas bear witness. These injustices must be the subject of lawsuits and legislative intervention. The Prison Litigation Reform Act should be amended to encourage access to courts by those least able to gain recognition and vindication of their rights.

When the stated purpose of juvenile court proceedings is to care for the child, and that is the rationale for confinement that would not otherwise take place, there is surely a *quid pro quo*. The cases that find fault with juvenile confinement facilities are based on statutory mandates that juveniles shall receive certain kinds of treatment. Cases that deal with abuse of juveniles can be dealt with under the law of torts and federal civil actions under such provisions as Section 1983.

The idea of *quid pro quo* for confinement has been expressed in the cases, eloquently by the D.C. Circuit in *Rouse v. Cameron*. Rouse held that a person confined in a mental institution had a right to treatment, enforceable by habeas

corpus. This right arises as a kind of constitutionally-mandated *quid pro quo* for confinement. The case may be seen to recognize that punishment can only be a consequence of a criminal law judgment, and that confinement in any other circumstance requires justification. When speaking of children, the transnational legal principles of which I shall speak in a moment are relevant and necessary parts of our analysis.

However, today I would like to focus on the inappropriateness of shuffling children into adult courts and then into adult prisons. My main task will be to focus upon the system for trying children for acts that would constitute a crime if committed by an adult. I will do so based on generally accepted principles of criminal law, interpreted in light of constitutional and transnational principles. I know that some lawyers, seeking justice for child clients, have reluctantly tried to move cases into the adult courts. They do not do this because the adult court is just, but only because in a given case or a given jurisdiction it is better than what the juvenile correctional system offers. That is not a true choice.

So, I survey the landscape and ask myself what can we do? I try to recognize that proposed solutions must begin from, or at least take account of, sets of generally accepted rules and principles. In the time I have to spend with you, I want to focus upon the time before a child is found to have committed a wrong, that is, upon the procedure by which we make that decision. Often, if that initial decision is to try the child "as an adult," then the later course of events, usually some kind of punishment, will be determined. I will not in this lecture address directly the constitutional and other implications of juvenile confinement conditions.

First, we need to study and heed the teachings of transnational law. Professors Dohrn and Birckhead, among many others, have written about the Convention on the Rights of the Child, or CRC. The CRC did not make international law. It expresses norms that have developed over time, and that had been applied in many contexts. The European Court of Human Rights has recognized these norms. The Supreme Court said in *Roper v. Simmons*: "[T]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."

The CRC sets out many principles that ought to govern juvenile justice. Its foundational idea is that there exists a category called "children," that is, humans under the age of eighteen. Like all categories, this one may be underinclusive or overinclusive as to cases at the margins, but it is not only useful but reflects contemporary understanding.

Of course, there are children of eighteen whose cognitive abilities are almost "adult," just as there are nineteen or twenty-year-olds whose abilities do not meet that standard. This issue is inherent any time the law draws a line. The international community draws the line at eighteen, and this seems a good enough place to start. Youthful age, perhaps extending into the twenties, may be mitigating in an adult court setting, so we are not making a line whose rigor denies all chance of rational argument about individual cases.

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It has been suggested that perhaps children should be subject, not to a rule that excludes them from the adult system, but to a rebuttable presumption to that effect. I regard this proposal as inviting complex litigation in an area already underserved by competent representation, and hence doomed to fail.

In our country, if you are under eighteen, there are many ways in which the law recognizes that your cognitive ability has not developed. You cannot buy cigarettes, enlist in the military, or vote. You can, as I have noted, be found guilty and sentenced to life without parole.

As Professor Dohrn argues, lawyers ought to be deploying this transnational law definition of "child" as a basic argument in seeking protection for their child clients. Professor Dohrn argues that the transnational principle of "child" should be a barrier to certain ways of treating children in the confinement, adjudication, and punishment processes. She invokes the CRC principle that arresting and trying a child should be a last resort, and that confinement must be for the shortest possible period.

It is no mystery why one would want a category called "child." Many sets of rights, or non-rights, are defined solely by the category into which a person is placed. We recognize women's rights, the rights of religious groups, the rights of prisoners of war. The George W. Bush administration invented a category called "alien enemy combatant." Such persons were to be denied habeas corpus protection, and the application of the Geneva Conventions. This sort of stratagem was not new to American law. Chief Justice Taney denied Dred Scott access to the courts because he was in a category that did not permit such access. Chief Justice Marshall kept the Cherokee Nation from asserting its rights by similar reasoning. Categories are important.

This category, "child," reflects a common understanding of contemporary life. Children do not have the cognitive ability of adults. If we think of forest dwellers, to take an example, a child's brain can operate on the flight or fight principle based on perceived danger. But the forebrain ability to stand in the forest when the light is a certain way, and to understand that every afternoon animals may pass by and be hunted, and to figure out how to do that hunting, that sort of faculty is less developed than in adults.

Now I turn to my second avenue of reasoning. I need to take you on a little tour of cognition in the adult criminal law. This tour is brief and incomplete; I take solace because Professor Joshua Dressler is here, and in his books you will find all the detail for which you may wish to look. The views I express, and any errors, are of course mine.

The fact is that the mental elements of many, if not most, offenses in the penal code do not reflect what scientific evidence teaches us about human cognition. We treat defendants "as if" they knew and intended. The movement to let scientific understanding into the criminal trial was well begun in California, with the *Wells* and *Gorshen* diminished capacity cases. "Diminished capacity" for what? To understand what was going on in the world and to make a rational cognitive response to it.

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That movement was stopped by the wave of state and federal legislation in the wake of the John Hinckley insanity verdict, even though the law applied in *Hinckley* had nothing to do with the *Wells-Gorshen* principle.

So, we limp along in the adult courts. In the battered spouse cases, courts and legislatures slowly recognized what was happening to women in abusive relationships, and they expanded the understanding of voluntary manslaughter and the definition of self-defense. The law of sexual assault was dominated for centuries by a male-based view of relationships, and by a concept of supposed consent that did not reflect what we know about how people do or do not give free consent to sexual penetration. There are reforms in the works, some more satisfactory than others. We try drug-related crimes in the inner cities "as if" the defendant had any realistic chance of making better life choices. The law deals in categories. If you are the plaintiff seeking redress, you fit your claim within a pattern. If you are a criminal defendant, the system that calls itself justice fits you into one that is chosen for you.

The French essayist Roland Barthes has written brilliantly about this objectification of the defendant. The criminal law system "judges man as a 'conscience' without being embarrassed by previously having described him as an object." Or, more tellingly:

> Periodically, a trial, and not necessarily a fictional one as in Camus' *The Stranger*, reminds you that justice is always ready to lend you a spare brain, in order to condemn you without remorse, or in the manner of Corneille, to paint you not as you are but as you must be.

Or in the original:

> "Périodiquement, quelque procès, et pas forcement fictif comme celui de l'Etranger, vient vous rappeler qu'elle est toujours disposée à vous prêter un cerveau de rechange pour vous condamner sans remords. . . ."

So when we propel children into the adult courts we are putting them into a situation that is overtly hostile to scientific knowledge about cognition, whether the defendant is an adult or a child. There is room here for serious reform. We need not go so far as Lady Barbara Wooton and say that the *mens rea* elements of penal offense should be scrapped in favor of individualized consideration of each defendant's circumstances. But we will surely agree with Professor Sandy Kadish that attempts to push the psychiatrists out of the criminal process is both wrong and ultimately futile.

The Supreme Court has reminded us over and over in capital cases that childhood is a mitigating circumstance. It has also recognized that sometimes the fact of childhood can be double-edged, in that someone may argue that the time to prevent further harm is now and that locking up the child for life—or executing the child—is the best and safest way. The Supreme Court has also said that, in capital

cases, evidence supporting the mitigating factor must be received, and when received given effect by means of jury instructions and lawyer argument.

The ordinary rules of the criminal law, viewed in perspective, teach two progressive lessons. First, this is no country for children. The rules as now interpreted may well prevent the child's lawyer from telling the judge and jury how the very fact of childhood may not simply mitigate but exonerate. Second, if you the lawyer find yourself alongside a child in this adult-judging place, you now have a case in which you have the clearest duty to lay bare the inadequacy of conventional understanding of *mens rea*, and the best opportunity to drive that lesson home.

I now turn to the third element of my analysis. Again, we all owe Professor Dressler our thanks. In his treatise, *Understanding Criminal Law*, you find the clearest exposition of the ideas that I now briefly discuss. The Supreme Court has wrestled with the problems of *mens rea*, status crimes, and the voluntary act in a constitutional and—may I say it?—para-constitutional way. We all know that certain principles of criminal law that came to us from England are enshrined in the Constitution although not expressed in its words. Foremost among these is the principle of proof beyond a reasonable doubt.

So let me mention just a few cases. In *Mullaney v. Wilbur*, the Court held that Maine could not shift the burden of nonpersuasion to the defendant on the issue of provocation in a homicide prosecution. The *Mullaney* principle is not as clear as one might wish, but at least we can say that the Due Process Clause puts limits on the state's allocation of burdens on an issue related to the defendant's mental state.

In *Robinson v. California*, California had made it a crime to be "addicted to the use of narcotics." The statute contained no act or mental state element. The Supreme Court held that the statute violated the Eighth and Fourteenth Amendments, noting that addiction could well be an illness, and punishment under it would be like punishing someone for having a cold. Why is it cruel and unusual to punish Robinson? Because, among other reasons, there is no "fault" attached to his conduct, neither a voluntary act nor any operation of cognitive power to make a choice. In *Powell v. Texas*, a divided Court upheld a Texas statute that criminalized getting drunk or being drunk in a public place. There was no majority opinion, and the four-justice plurality opinion is not very clear.

We must recall the constitutional challenges to the death penalty that culminated in the 1972 Supreme Court decisions that invalidated the death penalty statutes that existed in all states and in federal courts. Some of us hoped that at the next encounter, the standards the Court set in 1972 would be found impossible to meet and that the death penalty would be eliminated altogether. The 1976 cases did not go that far. However, they and the cases that followed did enshrine some principles that could well be used as the focus for an assault on the way children are being treated in the courts today.

In death penalty law, the Supreme Court has focused on two aspects of Eighth Amendment teaching. First, the Constitution requires that the selection of death-eligible defendants be done by means that promote rational decision-making. One

might also have located this idea in the Due Process Clause. This limitation serves to limit the number of people who will be sentenced to death and to ensure that mitigating evidence is given "meaningful effect," and that such evidence must include information not only about the offense but about the characteristics of this "particular individual" who is on trial. In at least two kinds of cases, the Eighth Amendment is held to require more than merely the effective presentation of mitigating evidence. The Court held in *Roper v. Simmons* that children who commit crimes may not be executed. *Atkins v. Virginia* held that mentally retarded persons may not be executed.

Second, and related, proportionality analysis dictates that only certain types of offenses can be the predicate of a death sentence. All of this Supreme Court teaching is directed at narrowing, by rational measures, the class of persons upon whom the death penalty may be imposed.

Finally, I note *Lambert v. California*. A Los Angeles ordinance required narcotics addicts to register. The Court found that potential registrants lacked "fair notice" of the requirement, and invalidated the statute on due process grounds. In *United States v. Bishop*, the defendant was prosecuted for having committed sabotage during a national emergency. The defendant's conduct occurred in 1969. The alleged national emergency was the Korean War, which had never been declared to be officially over. The court of appeals held that no person could reasonably believe in 1969 that the Korean War was still underway.

These fair notice cases bring to mind the classic Supreme Court decisions on mental state. In *United States v. Balint*, a 1922 case, the Court seemed to approve of so-called strict liability criminal statutes in a broad range of circumstances. However, in *Morissette v. United States*, in 1952, Justice Jackson eloquently described the pivotal role of *mens rea* in the criminal law. He did so in terms that lead me to use the term "para-constitutional" in describing *Morissette* and cases that follow from it. Surely cases like *Staples v. United States*, involving firearms, are influenced by a perception that the class of persons who own firearms are entitled to special attention. There are other cases that focus on the class of persons who require the protection of a certain kind of *mens rea* analysis.

This Constitution-based idea also finds support in the principle that competency to stand trial is a basic requirement of due process. As a general matter, children lack the competence that adults have. This fact is recognized in the various rules that limit what children under eighteen may do. In most civil cases, a child has no capacity to sue or be heard without an adult guardian ad litem. This idea of competence, as Professor Mallett has argued, should be a barrier to moving children into the adult criminal process. As Professor Mallett notes, the Supreme Court's decision in *Drope v. Missouri* mandates that if there is a substantial question about a defendant's competency, the process must halt until the competency determination is made.

Before I go further, I must acknowledge that Professor Dressler is right in saying that the current Supreme Court has not seemed ready to expand the reach of constitutional law in analyzing criminal statutes. However, the most conservative

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justices have been most assiduous in addressing at least some problems of *mens rea*.

So let's take these three ideas and see where they might lead us. The concept of "child" as a barrier to confinement and even to invocation of processes designed for adults suggests an opening. The United States has not ratified the CRC, yet its basic principles may be said to reflect norms of customary international law. Indeed, one might argue that the basic ideas of the CRC are peremptory norms, or *jus cogens*, from which no state is free to derogate. The second step in analysis is to recognize that customary international law and peremptory norms are part of the "laws" of the United States within the meaning of the Constitution's Supremacy Clause.

That international law, whether or not found in a treaty, can and should affect the judgments of courts cannot be doubted. This has been true since the Constitution was adopted. In the Nineteenth Century, the Supreme Court cited Vattel's leading international law treatise more than one hundred times, and his human rights treatise at least thirteen times. Federal courts have attached significant weight to transnational child rights principles in a number of cases. It is, after all, a general principle of construction that legislation should if possible be construed in harmony with international law. One may, therefore, say that the criminal law as applied to children must take account of this body of law.

Because the concept of "child" as a category meriting special consideration is part of international law, the "Charming Betsy canon" requires that domestic law be interpreted in harmony with it. Chief Justice Marshall wrote in the 1804 case of *The Charming Betsy* that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." The canon extends to other legislative provisions and governmental acts as well, although there will be some who doubt that it goes so far as to counsel, let alone compel, a particular reading of the Eighth Amendment and the Due Process Clause. As we survey the system that calls itself "juvenile justice" today, we can see:

- There are statutes, regulations, and prosecutorial decisions that pay no attention to the category of "child" as it defined by international law. The lessons of transnational law have not been heard in this setting. *Roper v. Simmons* says those lessons are at least relevant.
- The selection of children to be tried as adults is made by the exercise of unfettered discretion, often under statutes that encourage the exercise of that discretion to shuffle children into adult courts. The parallel to the pre-1972 system for selecting death-eligible defendants is striking. The exercise of such discretion raises issues under the Eighth Amendment, and the Due Process and Equal Protection clauses.
- Applying ordinary *mens rea* concepts to adults is problematic. Applying those categories to children traduces our understanding of how children make choices, and how their cognitive faculties develop. This practice raises Eighth Amendment issues under *Robinson v.*

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California, even in the wake of *Powell v. Texas*. It fails to account for the central role of *mens rea* in the criminal law, as emphasized in *Morissette* and constitutionalized to some extent in *Mullaney v. Wilbur*.

- The treatment of children in juvenile court and adult court often fails the basic due process standards set out in the case of *In re Gault*.

According children the constitutional right to challenge their competency to be treated as adults would pay some passing respect to *Drope v. Missouri*. Making sure children had the rights that *Gault* held essential would be a palliative.

But, there is one thing that David Bodiker's life and work teach us. The system under which defenders work is manifestly inadequate, not because courageous people are not working hard, for they are. It is inadequate because it is underfunded, under-respected, and understaffed. Bad enough, we say, for adults in the system; not nearly good enough for children.

No, we have reached here a constitutional tipping point. *Roper v. Simmons* might simply have required a case-by-case examination of children who kill. *Atkins v. Virginia* might have simply reaffirmed the *Penry* holding that mental retardation is a mitigating factor and left the law there. In both cases, however, the Court saw the need to draw a line that respected a category that human experience, scientific learning, and due process seemed to require be drawn.

The Supreme Court has granted certiorari in two cases that will tell us in 2010 how the Court might receive and react to these issues. In *Sullivan v. Florida* and *Graham v. Florida*, the Court will consider whether life without parole for a juvenile, for an offense other than homicide, violates the prohibition on cruel and unusual punishment. The Supreme Court has received about a dozen amicus briefs from jurists and social scientists. I understand that OSU students are doing research and writing on the issues raised in *Sullivan* and *Graham*. In this talk, I have tried to suggest a rather broader set of potential concerns than the ones raised in those cases.

Regardless of the outcome in *Graham* and *Sullivan*, there is this larger task before us. We need to draw a line today. We need a campaign that will be as focused as the 1960s and 1970s attack on the death penalty system, but expanded beyond a focus on the Eighth Amendment and into consideration of all the constitutional challenges that lie ready at hand. That campaign will have two purposes. First, it will demand respect for the category "child," and forbid judging and punishing children as though they were somebody they are not. Second, on the humane side of the line, it will work to ensure that the case of every child who commits a wrong of which we wish to take notice will be handled compassionately and in accordance with due process and international law. I have not spent time discussing this second goal today. Time does not permit, and others have written so eloquently about it.

However, the first principle of which I speak is the worthy task of this generation of lawyers, as the death penalty cases were the worthy task of that generation. To paraphrase Percy Shelley: "The young lawyers of our own age are,

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we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it."

That work would be the surest and truest tribute to David Bodiker's memory.

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